IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 17 OF 1999

Shri Lavachandra Gaundalkar
(deceased) through legal
heirs:

a. Ajit Gaundalkar,

b. Sanjay Gaundalkar,

c. Abhay Gaundalkar. ... Appellants/Original Defendants.

versus

Sitaram Atmaram Naik
businessman, residing at
Feira Alto, Behind Distikar's
House, Mapusa, Goa(since deceased)
through legal heirs:

a. Smt. Kamlabai Sitaram Naik,

b. Vrunda Sitaram Naik, son,

c. Ankush Sitaram Naik, son,

d. Lawachandra Sitaram Naik, son,

e. Aruna Sitaram Naik, daughter,

all resident of H.No.E/8,
164, Feira Alta, Mapusa, Goa.

f. Mrs. Milan Tulsidas Mahadeshwar,
daughter, H.No.8, Room No.195,
GIDC Colony, Vapi, Gujarat.

g. Mrs. Uma Umesh Shet Talaulicar,
daughter, r/o Talaulim-Goa.

h. Mrs. Vatsala Raphel Andrade,
r/o Sonar Bhat, Asrri, Saligao,
Bardez, Goa.

i. Shri Atmaram Sitaram Naik, son,
r/o 2 B.S. Kenny Chawl,
Opposite Laxman Resha Bldg.,
Dombivli East, Mumbai. ... Respondents/Original Plaintiffs.

Mr. M. S. Usgaonkar, Senior Advocate with Mr. Sudin Usgaonkar, Advocate for the Appellants.

Mr. S. D. Lotlikar, Senior Advocate with Miss Shreya Naik, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 20TH APRIL,2004.

DATE OF PRONOUNCING THE JUDGMENT: 10TH JUNE,2004.

J U D G M E N T

This is a Defendant's Appeal filed against Judgment and Decree dated 30th December, 1998 of the learned Civil Judge, Senior Division, Mapusa, in Special Civil Suit No.170/88/A.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The dispute between the parties is regarding shop no.4 belonging to Mapusa Municipal Council.

4. The Plaintiff (now deceased and represented by his legal heirs) was the first lessee of the said shop no.4 and the Defendant(since deceased and now represented by his legal heirs) was the first lessee of shop no.3, and, both were carrying cloth business in their respective shops.

5. The Plaintiff by virtue of an agreement dated 1st July, 1975, allowed the Defendant to use the said shop no. 4 suit shop. In terms of the said agreement, the Defendant was to pay Rs.5000/- to the Plaintiff upon execution of the said agreement and the balance amount to make up a total of Rs.37,800/- was to be paid every year for the next six years at the rate of Rs.5000/- per year and Rs.2,800/- in the eighth year. The said loan was not to carry any interest and in case the Plaintiff intended to transfer the said shop, option would be given to the Defendant, and, after the amount of Rs.37,800/- was paid in terms of the said agreement, vacant possession was to be given to the Plaintiff. The agreement was to come in force from 1st July, 1975 and an amount of Rs.350/- per month was to be deducted and adjusted towards the repayment of the loan amount advanced to the Plaintiff.

6. The case of the Plaintiff was that the Defendant in all paid to the Plaintiff Rs.31,000/- and that in terms of the said agreement, the Defendant was entitled to use the shop till January, 1983 and since the entire amount of Rs.31,000/- paid by the Defendant to the Plaintiff stood fully repaid by way of adjustment at the rate of Rs.350/- per

month, the Defendant was liable to vacate the suit shop.

7. The Plaintiff stated that somewhere in the year 1981, the Plaintiff realised that the Defendant, taking advantage of the Plaintiff, had played fraud and attempted to get the suit shop transferred in his name and the Plaintiff also realised that with the sinister motive the family members obtained his signature on the letter addressed to the President of the Mapusa Municipal Council which the Plaintiff subsequently came to know was dated 6th August, 1976 and in which it was stated that the Plaintiff was requesting the transfer of the lease in respect of the suit shop to Prabhakar Gaundalkar, who was in the service of the Defendant and was falsely described in the said letter as cousin brother of the Plaintiff.

8. The Plaintiff stated that he never agreed nor intended to transfer his lease hold rights in respect of the suit shop in favour of the said Prabhakar or the Defendant or any other person but the Defendant had allowed the Plaintiff to use the said shop only to the temporary difficulty arising from the fact that his sons were not old enough to carry the business in the suit shop on their own.

9. The Plaintiff stated that some time in August, 1981, a letter dated 7th August, 1981, was sent to him by the said Mapusa Municipal Council in which it was falsely alleged that the Plaintiff had sublet the suit shop to Shri Ajit L. Gaundalkar and Shri Shripad Gaundalkar and had thereby violated the conditions of the lease agreement and, therefore,the said agreement was liable for termination.

10. The Plaintiff stated that he was called upon to give an explanation as to why the said agreement should not be terminated. The Plaintiff stated that he came to know about the said letter dated 7th August, 1981, which was sent to him at the suit shop only on 29th September, 1981 and immediately on the same day, the Plaintiff wrote to the Chief Officer of the Mapusa Municipal Council denying that he had sublet the suit shop to either of them or to any other person.

11. The Plaintiff stated that at this time, the Plaintiff realised that there was a systematic conspiracy being hatched by the Defendant and his family members to get the lease of the suit shop transferred in their names by playing a fraud on the Plaintiff and the Plaintiff immediately on 24th

October, 1981, wrote to the said Chief Officer that he had neither transferred nor authorised any person to transfer the suit shop in anybody's name whatsoever and that he had a strong objection to transfer the same to any other person.

12. The Plaintiff stated that on 2nd November, 1981, the said Chief Officer requested the Plaintiff to see him immediately to have a discussion in connection with his application dated 29th September, 1981 and the Plaintiff visited the Chief Officer in response to the said letter dated 2nd November, 1981 and explained to him how the Defendant and his family members were acting regarding the transfer of the lease hold rights and requested him not to act upon the said letter. The Plaintiff further stated that he explained to the Chief Officer that he had not subleased the suit premises either to the said Ajit Gaundalkar or Shripad Gaundalkar but requested the Chief Officer that the notice dated 7th August, 1981 be discharged and the said Chief Officer assured the Plaintiff that he would consider the reply given by the Plaintiff as also the explanation given by the Plaintiff in person.

13. The Plaintiff stated that he waited for a

communication from the Mapusa Municipal Council for a considerable period of time and having come to know on discreet enquiries made from the Office of the Mapusa Municipal Council that the Defendant and his family members were making hectic efforts to get the lease transferred in their favour, therefore, the Plaintiff filed Regular Civil Suit No.419/81 on or about 14th December, 1981 against the said Mapusa Municipal Council and four others praying for a declaration that the agreement dated 1st July, 1975 stood terminated on account of the breach of the same committed by the Defendant and also for a decree of vacant possession of the suit shop to the Plaintiff and also for permanent injunction to restrain the said Council from transferring the lease to the suit shop in favour of Defendant No.1.

14. The Plaintiff stated that on 2nd January, 1981(Defendant in this suit) and the Defendant Nos.2 to 5 in Regular Civil Suit No.419/81 stated that the lease in respect of the shop was already transferred in favour of the Defendant prior to the filing of the said Civil Suit and on 25th February, 1982, an application was filed on behalf of the said Council informing that the lease was granted on 1st October, 1981. The Plaintiff stated that thereafter, he filed an application for permission to withdraw the

suit with permission to file a fresh suit in respect of the same subject matter which application was granted by the learned Trial Court by Order dated 28th June, 1983.

15. The Plaintiff stated that he continued to be the lessee of the suit shop and his lease was never terminated by the said Council. The Plaintiff stated that the possession of the suit shop was not delivered by him to the said Council nor was he evicted of the said shop by the said Council. The Plaintiff, therefore, stated that the said lease in respect of the suit shop entered by the said Council without his consent an intervention was not binding on him and did not alter his position in respect of the said shop. The Plaintiff stated that the so called purported lease created in favour of the Defendant by the said Council was null and void and in any case, the Plaintiff having allowed the Defendant to use the suit shop, the Defendant was estopped from denying the Plaintiff's entitlement to the said suit shop. The Plaintiff stated that the Defendant was not entitled to continue occupying or using the suit shop by virtue of any transaction which the Defendant might have independently entered into with any third party including the said Council. The Plaintiff stated that the Defendant

was inducted in the suit shop by him under an agreement dated 1st July, 1975 in terms of the conditions of the same which are binding on the Defendant and are enforceable against him by the Plaintiff.

16. The Plaintiff stated that the Defendant was entitled to occupy and use the suit shop in terms of the said agreement only till the amount advanced by him to the Plaintiff stood fully repaid by adjustments to be made as stipulated in the said agreement and as already stated, the total amount of Rs.31,000/- paid by the Defendant to the Plaintiff stood fully repaid by way of such adjustment by the month of January, 1983 and, therefore, the Defendant was liable to vacate the suit shop and deliver peaceful possession thereof to the Plaintiff in terms of the said agreement dated 1st July, 1975 on 1st February, 1983.

17. The Plaintiff, therefore, stated that he was entitled for a decree of eviction directing the Defendant to quit, vacate and deliver peaceful possession of the suit shop to the Plaintiff. The Plaintiff stated that since the use and occupation of the suit shop by the Defendant with effect from 1st February, 1983 was illegal and unauthorised, the

Defendant was liable to pay to the Plaintiff, mesne profits for the said unauthorised occupation. The Plaintiff, therefore, sought for a decree of eviction against the Defendant and mesne profits at the rate of Rs.3000/- per month from 1st February, 1983 till a vacant possession was delivered to the Plaintiff.

18. The Defendant contesting the suit, stated that the Plaintiff had approached him in the year 1975 explaining that had he to keep his shop closed then in that event, there was possibility of the said Council initiating action terminating the lease given to him and, therefore, the Plaintiff wanted the shop to remain open and the same to be used by the Defendant who was having business at the next adjoining shop. The Defendant stated that as the Plaintiff was also in financial difficulties, the Plaintiff proposed to the Defendant that the Defendant could make advance money to him required by the Plaintiff to meet his needs and the Defendant could occupy the shop for 9 years and deduct Rs.350/- per month and the Plaintiff proposed that the Plaintiff should be paid Rs.5000/- at the time of the execution of the agreement done and thereafter Rs.5000/- for every subsequent year until the amount for 9 years at the rate of Rs.350/- per

month was completed.

19. The Defendant stated that accordingly, an agreement was executed on 1st July, 1975 and the Defendant was put in occupation and possession of the suit shop no.4. The Defendant stated that business was started in the suit shop in the name and style of Gaundalkar Brothers Textiles (GBT Textiles) which was a sister concern of the said Gaundalkar Brothers in which the Defendant was a partner and carrying on business in the said adjoining shop no.3.

20. The Defendant stated that upon execution of the said agreement and despite payment of Rs.5000/- at the time of execution of the said agreement, the Plaintiff started demanding additional money from the Defendant claiming that the sum of Rs.5000/- already paid would not meet his needs and accordingly between 1st July, 1975 and 5th July, 1975, the Defendant paid to the Plaintiff Rs.10,000/- in instalments and the Plaintiff issued receipts in acknowledgement of the said payments.

21. The Defendant stated that since the Defendant was given mere right of occupation, the rent to the said Council was to be paid by the

Plaintiff and the Plaintiff represented that considering the payment of rent which would be Rs.892/- per year, the Plaintiff suggested that instead of the original form of payment, the Defendant should pay the rent to the said Council and instead of the Defendant making the said advance of Rs.5000/- per year, spread over for 7 1/2 years, the Defendant should pay immediately the entire consideration agreed upon and the Plaintiff would transfer the shop to the Defendant.

22. The Defendant stated that it was not possible for him to make the entire payment advanced but the Defendant could make the payment within 2 years provided the Plaintiff secured the necessary permission from the said Council. The Defendant stated that the Defendant already paid Rs.5000/- in the beginning and Rs.10,000/- within one week and the Plaintiff suggested that only in case Rs.10,000/- were paid at once, the Plaintiff would write a letter to the Council seeking transfer of the shop in the name of the Defendant and after discussion, it was agreed that the full amount would be paid within 2 years, the total consideration for the transfer having been fixed at Rs.34,000/-, besides Rs.5000/- paid at the time of the execution of the agreement. The Defendant stated that upon

the payment of Rs.10,000/- to the Plaintiff, the Plaintiff would issue a letter to the said Council and upon the payment of the balance amount, necessary document of transfer would be prepared and upon this belief all subsequent rents were paid by the Defendant from 22nd July, 1975 onwards to the said Council, though, in the name of the Plaintiff, such lease was not transferred until the date of actual transfer in the name of the Defendant. The Defendant stated that he was holding all receipts of payment of the said rents to the Council towards the suit shop.

23. The Defendant stated that he paid Rs.10,000/- on 10th June, 1976 by cheque No.732449 dated 10th June, 1976 and by that time, Rs.25,000/- was already paid to the Plaintiff and the Plaintiff wrote a letter to the Council requesting the Council to transfer the lease in respect of the suit shop in the name of his cousin brother, the said Prabhakar Gaundalkar.

24. The Defendant stated that the transferee was Prabhakar Gaundalkar, partner of Gaundalkar Brothers and who was close to the Plaintiff in relation, through the mother of the said Prabhakar.

25. The Defendant stated that in the subsequent year between 29th January, 1977 to 13th April, 1977, the Defendant paid to the Plaintiff Rs.11,000/- in instalments and the Defendant further stated that the Plaintiff was also demanding money, besides the amount paid by receipts.

26. The Defendant stated that the Plaintiff received a letter from the Labour Inspector in the year 1975 stating that the registration certificate of the establishment was not renewed and in reply, the Plaintiff wrote a letter to the Commissioner of Labour and Employment stating that the Plaintiff had sold the shop to M/s. G. B. Textiles and that the registration of the said establishment from the year 1976 was already in the name of the said G. B. Textiles.

27. The Defendant stated that in view of the occupation of the suit shop by the Defendant as a transferee and pursuant to the letter written by the Plaintiff on 16th August, 1976, the suit shop was transferred in the name of the Defendant on 1st October, 1981 and necessary payments were effected on 25th November, 1981 and 27th November, 1981 and from that time, all the rents have been paid by the Defendant directly in his name to the said Council.

28. The Defendant stated that the amount paid was not only Rs.31,000/- but also Rs.5000/- paid at the time of execution of the said agreement and besides other amounts were paid by the Defendant to the Plaintiff for which no receipts were issued. The Defendant denied that as per the agreement, the Defendant was entitled to use the suit shop till January, 1983 but the occupation, as per the agreement would have been till 30th June, 1984. The Defendant stated that the Plaintiff's contention that the Plaintiff was entitled to the suit shop till January, 1983, since the entire amount of Rs.31,000/- was paid by the Defendant, is misconceived as the said agreement does not at all refer to the said payment of Rs.31,000/- and in case Rs.31,000/- were taken into consideration, the amount would be complete in February, 1983.

29. The Defendant stated that the agreement dated 1st July, 1975, was no longer operative. The Defendant stated that in the earlier suit, the Plaintiff had sought the relief to treat the agreement as cancelled but in the present suit and inconsistently a plea has been taken to show that the Plaintiff is asking the possession on the basis of agreement dated 1st July, 1975 considering the same as valid and effective.

30. The Defendant further stated that in the said earlier suit, there were 5 more parties including the said Prabhakar Gaundalkar who was Defendant No.2 and in the said suit, the Plaintiff had stated that the said Prabhakar Gaundalkar was a remote relation of the Plaintiff and was in service of the Defendant. The Defendant has stated that not only letters dated 16th August, 1976 and 20th August, 1976 addressed to the said Council show that the transfer was genuine but also the letter dated 17th December, 1979 written by the Plaintiff to the Labour Commissioner corroborates that the transfer was genuine and was for consideration. The Defendant stated that the Plaintiff was capable of making false statements. The Defendant further stated that the withdrawal of the said Civil Suit No.419/81 was asked to file a fresh suit with a main purpose that the lease deed dated 1st October, 1981 is null and void and had no effect in law which meant that the relief to get vacant possession was already asked for and in addition a declaration that the lease deed was null and void was to be asked but the said relief is missing in the present suit. The Defendant, therefore, pleaded that the Plaintiff having omitted to sue for the main relief, the Plaintiff was not entitled to get the relief of recovery of possession. The Defendant further

stated that the said relief of declaration was to be asked within 3 years and the Plaintiff knew very well about the transfer made and so much so the Plaintiff even made an application dated 2nd August, 1982 for withdrawal of the earlier suit with specific mention that he wants to file a suit for declaration that the lease deed effected by the said Council in favour of the Defendant was null and void and had no effect in law and such a declaration could be given only when the said Council was a party but in the present suit, the said Council was not a party and the said suit having been filed in 1988, but prayer for declaration was not available, the same being barred by limitation.

31. The Defendant stated that at present, the Defendant was in possession of the suit shop not because the Plaintiff was inducted by him but because the Council has created a lease consequent upon the transfer made by the Plaintiff and any relief to be given would be ineffective without joining the said Council and without getting the declaration, as sought to be obtained in the application for withdrawal of the suit.

32. The Defendant stated that the Plaintiff is not basing his claim on the agreement dated 1st

July, 1975 and the amount of Rs.31,000/- which the Plaintiff admits was not paid in terms of the said agreement and if, it was a case of specific performance of agreement, the performance had to be sought within 3 years from the date 30th June, 1984 which gives rise to performance by 30th June, 1987 and at any rate the suit would be barred by limitation. The Defendant stated that the Plaintiff is not permitted to approbate and reprobate and if the Plaintiff had filed the earlier suit on the basis that he was entitled for termination for breach of agreement of 1st July, 1975, he was now not to be permitted to come to the Court on the basis that the agreement is valid. The Defendant stated that the transfer having been done on the basis of letter dated 16th August, 1976, if that declaration if otherwise was given with full knowledge, was obtained by some unauthorised means, action ought to have been taken to be delivered up. Action ought to have been taken to get the said letter delivered or rescinded within 3 years and so whichever way it is looked at, the suit is barred by limitation.

33. The Plaintiff expired on 31st January, 1991 and the evidence in support of the claim of the Plaintiff was given by the Plaintiff's son Ankush

Naik(PW1) who certainly did not have personal knowledge regarding the transaction or the subsequent execution of the documents by the said Plaintiff.

34. The Plaintiff also examined the Chief Officer of the Council, namely P.W.2, Gajanan Salkar, who has confirmed that the lease in respect of the suit shop has been transferred to the Defendant w.e.f. 27th November, 1981.

35. Arguments have been heard. It is a common submission made by both the learned Senior Counsels that the learned Trial Judge has considered a case which is neither of the Plaintiff nor of the Defendant and the learned Judge was confused on the real issue to be decided in the suit. I would leave it at that.

36. Mr. M. S. Usgaonkar, learned Senior Counsel appearing for the Appellants has submitted that the Defendant is not a trespasser as sought to be made out by the Plaintiff but is now a tenant of the Council having been inducting in the suit shop lawfully w.e.f. 27th November, 1981. Mr. Usgaonkar, has further submitted that the Plaintiff withdrew the first suit with a view to challenge the

lease deed by the Council in favour of the Defendant but filed the present suit again without challenging the said lease deed which challenge was otherwise time barred. Mr. Usgaonkar has submitted that the said lease deed in favour of the Defendant remains valid since the Plaintiff has not sought any declaration that the same should be cancelled. Mr. Usgaonkar further submits that although it is averred in the plaint that the said lease deed was bad in law, the Plaintiff has failed to pray for a declaration to that effect inspite of the fact that the Plaintiff knew of the existence of the said lease deed in the year 1982 but did not file a suit within 3 years thereof and filed a suit in the year 1988 which is beyond limitation and since the prayer of declaration of cancellation of the lease deed was not asked in the present suit, eviction being a consequential relief was not permissible since the main relief of declaration which was not prayed was barred by limitation.

37. On the other hand, Mr. S. D. Lotlikar, learned Senior Counsel appearing for the Respondents submits that the letter dated 16th August, 1976(Exh.D.1) was not acted upon by the Council and, therefore, the Plaintiff can ignore the said letter because the lease is not transferred in terms of the

said letter to Prabhakar Gaundalkar but was transferred to the Defendant. Mr. Lotlikar, has further submitted that the Defendant did not establish that the lease was transferred to the Defendant pursuant to the said letter dated 16th August, 1976. It is the submission of Mr. Lotlikar, that it is the Plaintiff who had inducted the Defendant in the suit shop and, therefore, the Defendant was entitled to continue till the date the Defendant made the payment to the Plaintiff and once the said payments were adjusted, the possession of the Defendant becomes that of a trespasser. Referring to Section 116 of the Evidence Act, Mr. Lotlikar, has submitted that the Defendant is estopped from disputing the title of the Plaintiff. Mr. Lotlikar, has placed reliance on the case of **Radheylal** v. **Ratansingh**(AIR 1977 NOC 340), **Vashu Deo** v. **Bal Kishan(AIR 2002 SC 569**) and **S. K. Sarma** v. **Mahesh Kumar Verma((2002) 7 SCC 505**) and has further submitted that the case of **Radheylal** v. **Ratansingh**(supra) is a complete answer to decide the present controversy.

38. Reference to the case of **Radheylal** v. **Ratansingh** (supra) was made in the case of **Vashu Deo** v. **Bal Kishan**(supra) and the case of **Vashu Deo** v.

Bal Kishan(supra) was relied in the case of **S. K. Sarma** v. **Mahesh Kumar Verma**(supra).

39. In the case of **Radheylal** v. **Ratansingh** (supra), it was observed that in a suit for ejectment by a lessee against the sub-lessee, the original lessor is not a necessary or a proper party. That the sub-lessee has alleged that he had become a tenant of the original lessor and set up a plea of jus tertii is no ground for joining the lessor as necessary party. In such a case, the Plaintiff claims no relief against the lessor nor is it a case where in absence of the lessor, the controversy between the parties could not be decided. The Court further observed that in a suit between the landlord and the tenant for possession on determination of tenancy, the tenant is bound to hand over possession to the landlord. He cannot escape from his obligation of delivering possession to his landlord by contending that he has entered into a contract of tenancy with a person who has paramount title over his landlord. Section 108(q) of The Transfer of Property Act, 1882 clearly indicates that the tenant is bound to put his landlord into possession of the property, which was taken on rent by him and he cannot escape from this obligation by voluntarily entering into contract

with a person from whom his lessor was holding the lease.

40. In the case of **Vashu Deo** v. **Bal Kishan,** the Hon'ble Supreme Court observed that under Section 108(q) of the Transfer of Property Act, 1882, in the absence of contract or local usage to the contrary, it is an obligation of the tenant to put his lessor into possession of the property on the termination of the lease. Section 116 of the Evidence Act which codifies the common law rule of estoppel between landlord and tenant, provides that no tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy, a title to such immovable property. The rule of estoppel so enacted has 3 main features. (i) The tenant is estopped from disputing the title of his landlord over the tenancy premises at the beginning of the tenancy; (ii) Such estoppel continues to operate so long as the tenancy continues and unless the tenant has surrendered possession to the landlord; (iii) Section 116 of the Evidence Act is not the whole law of estoppel between landlord and tenant. The principles emerging from Section 116 can be extended in their application and also

suitably adapted to suit the requirement of an individual case. The rule of estoppel which governs an owner of immovable property and his tenant would also mutatis mutandis govern a tenant and his sub-tenant in their relationship inter se. The estoppel continues to operate so long as the tenant has not openly restored possession by surrender to his landlord. It follows that the rule of estoppel ceases to have applicability once the tenant has been evicted. His obligation to restore possession to his landlord is fulfilled either by actually fulfilling the obligation or by proving his landlord's title having been extinguished by his landlord's eviction by a paramount title holder. Eviction by paramount title holder is a good defence bringing to an end the obligation of the tenant to put the lessor in possession of the property under Section 108(q) of the Transfer of Property Act, 1882. The burden of proving eviction by title paramount lies on the party who sets up such defence.

41. The Hon'ble Supreme Court further observed that to constitute eviction by title paramount no physical dispossession is necessary. If the true owner is armed with a legal process for eviction, which cannot be lawfully resisted, even though the

tenant is not put out of possession the threat to put him out of possession amounts to law of eviction. If in such circumstances the tenant openly and to the knowledge of his landlord attorns to the true owner, the estoppel is gone.

42. Section 116 of the Evidence Act reads as follows:-

> **"116. Estoppel of tenant and of licence of person in possession.-**
>
> No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof, shall be permitted to deny that such person had title to such possession at the time when such licence was given".(Emphasis supplied).

43. In the case of **S. K. Sarma v. Mahesh Kumar Verma**(supra) the Hon'ble Supreme Court observed that the second part of the above Section clearly provides that no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny the title to such person to such possession of the

property. He cannot deny the same during the pendency of such licence or sub-lease. Such estoppel continues to operate so long as the licensee or sub-tenant has not openly restored possession by surrender to such person. This rule of estoppel would cease to operate only after such licensee or sub-tenant has been evicted.

44. In my opinion, none of the cases cited on behalf of the Plaintiff have any answers at all to answer the controversy involved in this case because the fact situation is totally different. The Defendant does not deny that initially the Defendant came to occupy the suit shop pursuant to the first agreement between the Plaintiff and the Defendant dated 1st July, 1975(Exh.D.2) but it is the case of the Defendant that the said agreement was modified and replaced by which the entire advance to be given to the Plaintiff was to be completed within 2 years instead of 8 years as originally agreed in consideration of which the Defendant would transfer his lease hold rights in the suit shop in favour of the Defendant and after the Plaintiff impliedly surrendered the said lease hold rights in favour of the Council that the Council executed a new lease deed in favour of the Defendant w.e.f. 27th November, 1981 and in pursuance of the same that the

Defendant is now occupying the suit shop as a licensee of the said Council. It is this case which appears to be far more probable than the case pleaded and sought to be proved by the Plaintiff.

45. As already stated by the time the suit came up for evidence, the Plaintiff was dead and the evidence was given by the son of the Plaintiff who did not have much knowledge about the initial agreement dated 1st July, 1975 or the subsequent agreement between the Plaintiff and the Defendant or further developments regarding the suit shop between the Plaintiff, the Council and the Defendant. The Defendant(DW1) in his evidence stated that as per the said agreement dated 1st July, 1975, they opened their shop in the name of G. B. Textiles that is to say Gaundalkar Brothers Textiles. D.W.1, Lavuchand Gaundalkar, further stated that soon after the Plaintiff started asking for more money and they paid him in addition to Rs.5000/-, Rs.10,000/-. D.W.1, Lavuchand Gaundalkar, further stated that thereafter within a year, the Plaintiff approached him and told him that he would completely transfer the shop in his name in case he paid him Rs.10,000/- and in all Rs.36,000/- and accordingly, he gave his no objection to transfer the suit shop in the name of Prabhakar Gaundalkar. D.W.1, Lavuchand

Gaundalkar explained that the said Prabhakar Gaundalkar was chosen because he was the cousin brother of the Plaintiff and because of the said relationship, the Council would not take objection for the said transfer and besides, the said Prabhakar was also a partner of the firm and his cousin brother. He produced the letter dated 16th August, 1976 addressed by the Plaintiff to the said Council at Exh.D.1. D.W.1, Lavuchand Gaundalkar, further stated that although the Plaintiff was supposed to pay the municipal rent from the amount they were paying to him, they were deducting the municipal rent by paying the Council and making the difference to the Plaintiff. He stated that accordingly, they paid the entire amount of Rs.36,000/- and when the Inspector of Shops and Establishments came for inspection, the Plaintiff gave in writing that he was not in a position to run the shop. He produced the said letter signed by the Plaintiff dated 17th December, 1979 at Exh.D.2 addressed to the Commissioner, Labour and Employment. He further stated that in 1977, the total payment of Rs.36,000/- was made to the Plaintiff. D.W.1, Lavuchand Gaundalkar, further stated that after some time, he went to ask for the original agreement but the Plaintiff avoided to give the same to him and that thereafter, they started

paying the taxes to the Labour Commissioner. He produced the agreement with the Council dated 1st October, 1981(Exh.D.6) entered by him with the said Council and further stated that thereafter, the Council started issuing the receipts in his name. He stated that he is not supposed to hand over the shop to the Plaintiff(or to his legal representatives) since the Plaintiff has already transferred the shop in his name and original contract was rescinded. In cross-examination, the Defendant admitted that he came in possession of the shop by virtue of the said agreement dated 1st July, 1975(Exh.D.2). The Defendant stated that the firm G. B. Textiles was formed in the year 1975 of which Ajit Gaundalkar and Shripad Gaundalkar are the partners. He stated that he had no personal interest in the said firm G. B. Textiles. However, it is to be noted that the Defendant in his written statement had admitted that M/s G. B. Textiles was a sister concern of Gaundalkar Brothers of which the Defendant was a partner and was carrying on business in the said shop no.3. The Defendant admitted having received a notice from the Council dated 7th August, 1981 addressed to the Plaintiff alleging that the shop was sublet to the said Ajit Gaundalkar and Shripad Gaundalkar, the former being the son of the Defendant. He denied

that as per the agreement dated 1st July, 1975 that it was mentioned in the agreement that in case the Plaintiff wanted to sell the suit shop the Defendant would get first preference, a denial which was otherwise contrary to the said agreement dated 1st July, 1975. D.W.1, Lavuchand Gaundalkar, admitted that the Plaintiff had not transferred the shop in his name and had also not given in writing that the shop should be transferred in his name. He also admitted that the Plaintiff had not surrended the shop to the Council and that the Council had also not taken over the shop from the Plaintiff.

46. On the other hand, P.W.1, Ankush Naik, admitted that it was agreed between the Plaintiff and the Defendant that the Defendant would advance Rs.37,800/- to the Plaintiff and that the repayment would be done by adjusting Rs.350/- per month. However, P.W.1, Ankush Naik, admitted that Rs.10,000/- were paid on the next date of the said agreement dated 1st July, 1975 contrary to the said agreement and again admitted that in the year 1976 another Rs.10,000/- were paid by cheque and further admitted that Rs.11,000/- were paid in the year 1977 and further admitted that in all Rs.36,000/- were received by the Plaintiff from the Defendant. However, P.W.1, Ankush Naik, conceded that the

original agreement was for Rs.37,800/- and out of which the Plaintiff received Rs.36,000/- but gave no explanation whatsoever as to why the Plaintiff did not make any claim to recover the balance amount of Rs.1,800/-. P.W.1, Ankush Naik, admitted the execution of the letter dated 16th August, 1976 addressed by the Plaintiff to the Council(Exh.D.1) and letter dated 17th December, 1979(Exh.D.2) addressed by the Plaintiff to the Commissioner, Labour and Employment, but gave no credible and acceptable explanation as to why the Plaintiff had addressed the said letters. P.W.1, Ankush Naik, admitted having received a letter dated 24th September, 1981 from the Council but did not produce the same. On the contrary, P.W.1, Ankush Naik, produced a letter dated 2nd November, 1981 at Exh.PW1/3 by which the Chief Officer of the Council called upon the Plaintiff to have discussion with him regarding the transfer of the suit shop. P.W.1, Ankush Naik, although showed a desire to produce the said letter dated 24th September,1981, failed to produce the same. Again, P.W.1, Ankush Naik, although stated that he sent a reply to the said letter, P.W.1, Ankush Naik, failed to produce a copy of the same but later on came with an explanation, an explanation which cannot be accepted that he had applied for a copy of the said letter to the Council

and he was informed that it could not be issued to him. P.W.1, Ankush Naik, further stated that on 29th October, 1981, he wrote a letter to the Council that the suit shop was not to be subleased to anybody and that he had a strong objection to grant a lease of the suit shop to anyone but failed to produce any such letter. P.W.1, Ankush Naik, further stated that after he received the said letter dated 2nd November, 1981(Exh.PW1/3) he informed them that all the Defendants could obtain the signature of his father for transferring the lease in their favour. This statement of P.W.1, Ankush Naik, only shows that the Plaintiff had no objection in case the lease which was existing in his name was transferred to the Defendant or any of the partners of the said M/s G. B. Textiles. Again, P.W.1, Ankush Naik, admitted that the Defendant was running the business in the suit shop in the name of G. B. Textiles and at the same time stated that he did not know whether Prabhakar Gaundalkar was running the business in the suit shop. P.W.1, Ankush Naik, conceded that the said Prabhakar Gaundalkar was not made a party in this suit while he was made a party in the previous suit and gave no explanation as to why the other Defendants who were made parties to the said Civil Suit were not made parties to the present suit

inspite of the fact that the Plaintiff had withdrawn the first Civil Suit with a clear representation that he was withdrawing the said Civil Suit because his reliefs had become infructuous and he wanted to seek a declaration that the lease deed by the Council in favour of the Defendant had become null and void and of no effect in law, a relief which,the Plaintiff has not at all sought in the present suit.

47. The admissions regarding payments made contrary to agreement dated 1st July, 1975 clearly go to show that after the Plaintiff inducted the Defendant into the suit shop pursuant to the said agreement dated 1st July, 1975, there was modification in terms of the said agreement. It is to be noted that the parties did contemplate by virtue of Clause 5 of the said agreement that in case the Plaintiff intended to transfer the suit shop for consideration and with necessary permission, option would be given to the Defendant. The Defendant's plea that there has been an implied surrender of his lease hold rights in favour of the Council pursuant to which a fresh lease was created by the said Council in favour of the Defendant appears to be far more probable than the case of the Plaintiff that there was a systematic conspiracy hatched by the Defendant and his family members to

get the lease in respect of the suit shop transferred in their names by playing a fraud on the Plaintiff. The Plaintiff produced letter dated 2nd November, 1981(Exh.PW1/3) which shows that the Plaintiff was called for a discussion regarding the transfer of the suit shop. One does not know what transpired at the said meeting between the Plaintiff and the said Chief Officer but it is safe to presume that the Council or its Chief Officer would not have entered into a lease agreement with the Defendant unless the Plaintiff had consented to the same. P.W.1, Ankush Naik, has failed to produce the letter dated 29th October, 1981 by which P.W.1, Ankush Naik, claims that he had informed the Council by the said letter not to sublease the suit shop and, therefore, this would be a fit case to draw adverse inference against the Plaintiff. The Plaintiff also failed to produce any other letter written by the Plaintiff taking an objection for the transfer of the suit shop either pursuant to the letter dated 16th August, 1976(Exh.D.1) or letter dated 17th December, 1979(Exh.D.2). The said two letters clearly show that the Plaintiff had no objection for the transfer of the suit shop either in the name of the said Prabhakar Gaundalkar or for that matter in the name of M/s G. B. Textiles which was a sister concern of Gaundalkar Brothers of which the

Defendant was a partner. In the absence of any evidence as to what transpired between the Plaintiff and the Chief Officer of the said Council and in the light of the said letters dated 16th August, 1976 and 17th December, 1979, it is safe to presume that the transfer of the suit shop was done by the said Chief Officer in the name of the Defendant with the consent of the Plaintiff which would amount to surrendering the lease hold rights by the Plaintiff in favour of the said Council and the Council in turn creating lease hold rights in favour of the Defendant. That being the position, the Defendant would be wholly justified in contending that the Defendant is presently occupying the suit shop not pursuant to the agreement between the Plaintiff and the Defendant dated 1st July, 1975 but pursuant to the transfer done by the Council in favour of the Defendant from 27th November, 1981. The Defendant would be again right in contending that unless the said transfer by the Council in favour of the Defendant is challenged, a challenge which is otherwise time barred, the Plaintiff would not be entitled to recover the possession of the suit shop from the Defendant without making the said Council a party to the suit. In view of this factual situation, the authorities cited on behalf of

the Plaintiff would be clearly inapplicable to this case.

48. In view of the above, the Appeal deserves to succeed and the Judgment/Decree of the Trial Court dated 30th December, 1998, deserves to be set aside and consequently the suit of the Plaintiff dismissed with costs. Order accordingly.

N. A. BRITTO, J.

RD.